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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1040

JAMES GIVENS ..... *Petitioner*

v.

THE STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court entered in the above entitled case on September 11, 1967, and also denied on re-hearing October 16, 1967.

CITATION TO OPINIONS BELOW

A xerox copy of the opinion of the Supreme Court of Arkansas is attached hereto but has not been reported as of this writing.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on September 11, 1967, and re-hearing denied

October 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

QUESTIONS PRESENTED

1. Whether defendant's incarceration in Pulaski County jail under hold order and subsequent incarceration in Jefferson County jail, with trial passed twice over defendant's strong objections was in violation of defendant's civil, state, and federal rights to a speedy and public trial as guaranteed by the Arkansas and United States of America Constitutions.

2. Whether once such right accrued to defendant the court erred in overruling defendant's motion to discharge the accused and dismiss the information filed herein.

STATEMENT

On April 4, 1966, defendant James Givens, along with one Leroy Martin alias Leroy Murray were arrested in Little Rock, Pulaski County, Arkansas, on a charge of assault with intent to rob allegedly committed March 31, 1966, in Pulaski County, Arkansas, and placed in Pulaski County Jail. On this same date Joe Holmes, prosecuting attorney, Pine Bluff, Jefferson County, Arkansas, filed two informations accusing the said James Givens and Leroy Martin alias Leroy Murray of Armed Robberies committed in Pine Bluff, Jefferson County, Arkansas, on March 29, 1966, and on March 31, 1966. A "hold order" was placed on the accused by Pine Bluff authorities, negating defendant's right to bail. Leroy Martin alias Leroy Murray plead guilty on May 9, 1966, to the Pulaski charge and was sentenced to the penitentiary. On July 13, 1966, as a result of bench warrant dated April 4, 1966,

Pine Bluff authorities took custody of accused and took him from Pulaski Jail to Jefferson County jail. Bail was set at $10,000.00 on each of the two charges.

On September 21, 1966, the case came up for trial in Jefferson County Circuit Court and was passed over defendant's strong objections. On December 1, 1966, it came up again and was passed, again over defendant's vehement objections.

During this incarceration, Jefferson authorities attempted twice to secure guilty plea from defendant, without defendant's attorney being present. On January 23, 1967, defendant was heard before Hon. Henry W. Smith, Jr., in Jefferson Circuit Court on motion to dismiss the information.

The motion was overruled and trial had been set on January 23, 1967, and defendant James Givens was found guilty of robbery and sentenced to seven years. On motion filed February 28, 1967, defendant moved that the order of January 23, 1967, denying motion for speedy trial and praying for discharge of defendant and dismissal of information, be set aside and that the court set aside the verdict of the jury and forever discharge the defendant. The motion was overruled and exceptions saved.

An appeal was perfected to the Supreme Court of Arkansas and in an opinion of September 11, 1967, the court affirmed the judgment and order of the trial court. The petition for re-hearing was filed September 26, 1967 and was denied October 16, 1967.

From such ruling comes this appeal.

REASONS FOR GRANTING THE WRIT

1. *Certiorari should be granted to determine whether or not the defendant's incarceration in Pulaski County*

jail under hold order and subsequent incarceration in Jefferson County jail, with trial passed twice over defendant's strong objections was in violation of defendant's civil, state, and federal rights to a speedy and public trial as guaranteed by the Arkansas and United States of America Constitutions.

This case concerns a flagrant abuse of defendant's rights to a speedy trial as guaranteed by the State and Federal Constitutions. Article 2, Section 10 of the Constitution of the State of Arkansas states "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury . . . "

Indeed this right is one of the most basic fundamentals of justice. It is thusly expressed in *Magna Carta* (1215) "we will sell to no man, we will not deny or defer to any man either justice or right." Sir Edward Coke in his *Institutes* referred to justices, by thirteenth century, armed with commissions of goal delivery, visiting the countryside three times a year. "These justices," he wrote, "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, without detaining him long in prison."

In the early case of *Ware* v. *State*, 159 Ark. 540, Gladstone is quoted, "Justice delayed is justice denied." This case continues: "it is highly important to the public weal that those accused of crime shall be brought to a speedy trial in order that, if guilty, public justice may be meted out without delay." 30 ARL2 463 states the issue: "However, if the trial is delayed by reason of the neglect or laches of the prosecution in preparing for it, when there is a term of court at which it might be had,

such delay is a denial to defendant of his rights to a speedy trial."

Here the record reflects blatant and notorious disregard for defendant's right to a speedy trial. He was arrested in Pulaski County on April 4, 1966, and on April 29, 1966, charged with assault with intent to rob. The hold order from Jefferson County negated his chance for bail relief and accused languished in Pulaski jail until picked up by Jefferson authorities July 13, 1966 (R.9), this based upon Bench Warrant dated April 4, 1967 (R.8). It is not clear to petitioner, nor do the records in Pulaski County reflect, why James Givens was turned over to Jefferson County with the assault charge pending. On the very day after Givens was transferred to Jefferson jail, petitioner's attorney wrote Joe Holmes, Prosecuting Attorney, requesting an early trial (R.47). Defendant's Exhibits 4, 5, and 6 reflect repeated attempts by mail and otherwise to secure trial (R.46-47-48).

It is fundamental that for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on the record in the attitude of demanding a trial, or at least of resisting postmonemnet.

Stewart v. *State* 13 Ark. 720; *Fox* v. *State* 102 Ark. 393; *Ware* v. *State* 159 Ark. 540; *Dillard* v. *State* 65 Ark. 404; *Fulton* v. *State* 128 Ark. 841; *Williams* v. *State* 210 Ark. 402.

The issue is stated in 57 ALR 2nd 306 "The record must show on objection to the delay complained of, otherwise it will be presumed that the delay was with the consent of accused, thereby precluding him from complaining that he was not accorded a speedy trial."

Petitioner is aware of *Arkansas Statute* 43-1705 and is not alleging that the facts have come within the purvue of this Act. Petitioner does allege that this statute is unconstitutional and not attune with recent decisions of the United States Supreme Court. Particular reference is made to *Klopfer* v. *State of North Carolina* decided March 13, 1967, on Writ of Certiorari to Supreme Court of North Carolina. This case is reported in *35 law week 4248.* The opening statement of Chief Justice Warren's opinion squarely states the issue here involved: "The question involved in this case is whether a state may indefinitely postpone prosecution on an indictment without stated justification over the objection of an accused who has been discharged from custody."

The case in question is even stronger than *Klopfer* since there the accused was not held in jail. The *Klopfer* decision quotes *Gideon* v. *Wainright,* 372 U.S. 335 (1963) and *Pointer* v. *Texas,* 380 U.S. 400 (1965). The latter case held: "In the light of Gideon, Malloy and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States and can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that guarantee, like the right against compelled self-incrimination, is to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."

Here the accused was held in jail from April 4, 1966, to date of trial, January 23, 1967 (R.12-a). Trial was

originally set for September 21, 1966, and passed, then set December 1, 1966 and passed, at all times over appellant's strong objections. On two occasions accused was brought before Judge Smith in an attempt to secure a guilty plea without petitioner's attorney being present (R.34-36). Of significance is the fact that there have been two criminal jury trials in Jefferson Circuit Court since April 8, 1966 (R.29).

2. *Certiorari should be granted to determine whether or not once such right accrued to defendant the court erred in overruling defendant's motion to discharge the accused and dismiss the information filed herein.*

Assuming that petitioner's motion should have been granted, could Jefferson Circuit Court proceed with trial of accused? 50 ALR2 9+3 states: "Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense."

When an issue of law or fact is passed upon by a court, and an order is made by it which determines the rights of the parties in the action finally, so far as that court is concerned, then such order becomes the final determination of the cause from which an appeal will lie. *Ware* v. *State, supra; Batesville* v. *Ball,* 100 Ark. 496.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX OF LOWER COURT OPINION

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APPENDIX OF LOWER COURT OPINION

J. FRED JONES, Associate Justice

This is an appeal from the Jefferson County Circuit Court denying appellant's motion to discharge the appellant and dismiss the information filed against him, and in overruling appellant's subsequent motion to set aside a jury verdict and grant a new trial.

The record reveals the following facts: On April 4, 1966, informations were filed by the prosecuting attorney in Jefferson County, charging the appellant Givens, and

also one Martin, with armed robbery, and a bench warrant was issued for the appellant. The warrant was served and appellant taken into custody on July 13, 1966. Appellant remained in custody, unable to make bail, until his jury trial on January 23, 1967.

On January 23, 1967, prior to trial, the appellant filed a motion for his discharge and for dismissal of the information filed against him, because he had been in jail since his apprehension and had not been permitted to enjoy the right of a speedy trial as provided in the state and federal constitutions. The motion was overruled by the trial court, the jury returned a verdict of guilty and fixed punishment at seven years in the penitentiary. Appellant waived the forty-eight hour delay in sentencing and was sentenced to seven years in the state penitentiary by order of the court entered on January 23, 1967. Appellant's subsequent motion for a new trial was overruled and this appeal is from the orders denying the motions.

Appellant sets out two points he relies on for reversal, as follows:

> "1. Defendant's incarceration in Pulaski County jail under hold order and subsequent incarceration in Jefferson County jail, with trial passed twice over defendant's strong objections was in violation of defendant's civil, state, and federal rights to a speedy and public trial as guaranteed by the Arkansas and United States of America Constitutions.
>
> "2. Once such right accrued to defendant the court erred in overruling defendant's motion to discharge the accused and dismiss the information filed herein."

All the evidence, in the record before us, is directed to the delay in trying the case after appellant was arrested. On July 14, 1966, appellant's attorney wrote a letter to the prosecuting attorney requesting that the case be placed on docket for an early trial. On August 9, 1966, appellant's attorney again wrote to the prosecuting attorney calling attention to an agreement to try the case as soon as possible and requesting the prosecuting attorney to contact the trial judge in an effort to get the case set for trial. On October 21, 1966, appellant's attorney advised the appellant that his case had been set for trial on December 1, 1966.

The record indicates that the appellant and his co-defendnant may have been tried together. In any event, no motion for severance is in the record and the record reveals that an attorney was appointed by the court to represent appellant's co-defendant, and that the court, on its own motion, passed the cases for trial on December 1, 1966, because the co-defendant's counsel had not had time to prepare for trial following appointment. On December 7, 1966, appellant's counsel wrote a letter to the Circuit Judge requesting a jury trial at the earliest possible date and the case was tried on January 23, 1967.

A second postponement in the trial of the case was mentioned at the hearing on motion in chambers and is referred to in appellant's brief, but the record is not clear as to any other specific dates the appellant's case was set for trial except on December 1, 1966, when it was passed, and on January 23, 1967, when it was tried.

Appellant concludes his brief as follows:

> "The question here is whether an incarceration from April 4, 1966, to January 23, 1967, with

> accused constantly demanding trial, and with trial passed over twice over defendant's objections, despite only two trials in eight months, is a violation of appellant's constitution guarantees of speedy trial."

The record before us does not sustain the contention that appellant was incarcerated from April 4, 1966, to January 23, 1967, on the charges for which he was tried. The sheriff's return on the bench warrant is as follows:

> "I hereby certify that I have executed the within Bench Warrant by taking the body of the within named James Givens C. M who is now in custody subject to the orders of the Court, this 13 day of July, 1966."

The appellant argues in his brief that he had been held in jail for eight months awaiting trial, but he testified on the day of his trial that he had been in custody about six months.

A trial court has a great deal of discretion in the postponement of trials under Ark. Stat. Ann. §43-1705 (Repl. 1964). This is necessarily so in the orderly conduct of the business of the courts in the various counties of a district, and the work of a trial judge in a four court district cannot be accurately measured by the number of jury trials alone, conducted in any one of the courts of the district. We find no abuse of discretion by the trial court in the case before us, and we are of the opinion that appellant's right to a speedy trial was not violated in this case.

Information was filed, warrant issued, and the appellant taken into custody during the March 1966, term

of Jefferson County Circuit Court, and appellant was tried in the following October 1966 term. (Ark. Stat. Ann. §22-310 [Repl. 1962]).

Ark. Stat. Ann §43-1708 (Repl. 1964) provides as follows:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

and Ark. Stat. Ann. §43-1709 (Repl. 1964) limits the time a person may stand indicted without trial while free on bail.

We do not agree with appellant's argument that Ark. Stat. Ann. §43-1705 "is unconscionable and not attune with recent decisions of the United States Supreme Court." Section 43-1705 provides for postponement of trial "upon sufficient cause shown by *either* party" and the cases indicate that defendants have invoked the provisions of this statute far more often than the prosecution.

The United States Supreme Court case of *Klopfer* v. *State of North Carolina,* 35 Law Week 4248, cited by appellant, is not in point with the case here.

In the Klopfer case the defendant was indicted for criminal trespass on February 24, 1964. He was tried in March of 1964, but the jury failed to reach a verdict and the case was continued for the term. Prior to the April

1965, session of the court, the prosecuting attorney informed the defendant that he intended to have a "*nolle prosequi* with leave" entered in the case, but instead the prosecuting attorney moved to continue the case for another term and the motion was granted. The case was not set for trial in the August 1965 session and the defendant filed a motion to have the charge pending against him permanently concluded in accordance with the applicable laws of the state of North Carolina and the United States as soon as is reasonably possible, noting that some 18 months had elapsed since the indictment. In response to the motion, the trial judge considered the status of the defendant's case in open court in August 1965, and at that time the prosecuting attorney moved the court that the state be permitted to take a "*nolle prosequi* with leave," and the court granted the motion over the defendant's objections.

Nolle prosequi with leave under the North Carolina practice procedure was simply a method whereby an accused was permitted to remain free *under indictment* indefinitely or until such time, as the prosecuting attorney *in his discretion,* saw fit to reinstate the case and try the accused on the charge for which he stood indicted.

North Carolina did not have a statute for the protection of the accused like our Ark. Stat. Ann. §43-1708, supra. We are of the opinion that this statute is sufficient security in Arkansas for the speedy trial contemplated by the constitutions of Arkansas and the United States, and we find nothing in the record before us that would justify the shortening of that period by our decision in this case.

The judgment and orders of the trial court are affirmed.

Respectfully submitted,

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